Supreme Court, U.S.
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No. 99-1232

In The

Supreme Court of the United States

GRAND RAPIDS PLASTICS, INC.,

Petitioner,

vs.

CRAIG M. LAKIAN, JAMES CHAPMAN,
H&L ENGINEERING, INC.
and PINE RIVER PLASTICS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT PINE RIVER PLASTICS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court properly granted Respondents' motions for summary judgment dismissing Petitioner's complaint as not being brought within the applicable limitation period established by 15 U.S.C. § 15b, when commission sharing payments, although continuing until 1995, were in consummation of certain challenged agreements between Respondents Lakian and Chapman made in 1989 and 1990 (more than four years preceding Petitioner's complaint), which agreements related to the issuance (in 1989 and 1990) of purchase orders from Daikyo-Decoma (not a party to this action) to Respondent Pine River for the manufacture of automotive parts.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Pine River Plastics, Inc. is a Michigan corporation. It has no corporate parent, no subsidiaries and no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Dismissing or Denying This Petition ... 1

The Decisions of the District Court and the Court of Appeals Do Not Conflict with Applicable Law Discussing the Application of the Statute of Limitations in Robinson-Patman Act Cases 1

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Columbia Steel Casting Co., Inc. v. Portland General Electric Co., 111 F.3d 1427 (9th Cir. 1996).....3, 4

DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462 (6th Cir. 1996).....4, 5, 6

Grand Rapids Plastics, Inc. v. Lakian, et al., 188 F.3d 401 (6th Cir. 1999).....9

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).....6, 7, 8

Hennegan v. Pacifico Creative Service, Inc., 787 F.2d 1299 (9th Cir. 1986).....2, 3

Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975).....7

Twin City Sportservice, Inc. v. Charles O. Finley Company, Inc., 512 F.2d 1264 (9th Cir. 1975).....6, 7

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).....4

STATUTES

15 U.S.C. § 15b.....1

STATEMENT OF THE CASE

Respondent Pine River Plastics, Inc. adopts the "Counter Statement of the Case" set forth in the Brief in Opposition to Petition for Writ of Certiorari Filed by Respondents James Chapman and H&L Engineering.

REASONS FOR DISMISSING OR DENYING THIS PETITION

The Decisions of the District Court and the Court of Appeals Do Not Conflict with Applicable Law Discussing the Application of the Statute of Limitations in Robinson-Patman Act Cases

The primary basis urged by Petitioner as to why its petition should be granted is that certain commission sharing payments made by Respondent Chapman to Respondent Lakian extending into 1995 constitute new and independent overt acts occurring within the statute of limitations period established by 15 U.S.C. § 15b, thus resulting in continuing violations of the Robinson-Patman Act and permitting Petitioner to maintain this cause of action. However, both the District Court and the Court of Appeals for the Sixth Circuit recognized that the overt acts involved here were the award by Daikyo-Decoma to Pine River Plastics of certain purchase orders for automotive parts to be manufactured by Pine River and sold to Daikyo-Decoma. The purchase orders were issued in 1989 (as to the "transfer work") and in 1990 (as to the "1992 model year work"). Pine River's independent manufacturer's sales representative, Chapman (doing business as H&L Engineering), agreed (again no later than 1990) to split commission payments on the "transfer work" and

the "1992 model year work" with Craig Lakian who, it is alleged, had the ability to direct the award of the purchase orders by Daikyo-Decoma to Pine River. Deliveries of product pursuant to the two purchase orders continued into 1995, and commissions were paid by Pine River to Chapman during that period. Upon receipt of each commission, Chapman shared a portion of it with Lakian. Both of the allegedly offending purchase orders were issued more than four years prior to the institution of this suit.

Petitioner argues that the continued payment of commissions, and the sharing of those commissions between Chapman and Lakian (such sharing occurring within four years prior to commencement of suit), constitute new and independent overt acts which avoid the application of the Robinson-Patman Act's four-year statute of limitations. However, all authority cited by Petitioner is inapposite and can be distinguished.

Petitioner relies heavily on *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299 (9th Cir. 1986). On page 15-16 of the petition filed in this action Petitioner states that the Ninth Circuit "held the illegal kickbacks paid after the statute expired restarted the limitations clock; characterizing the payments themselves as 'overt acts.' [citing *Hennegan, supra*]" This mischaracterizes the holding of the Ninth Circuit in *Hennegan* (*supra* at 1300-1301), wherein the court states that the "payments by the souvenir vendors to the tour operators *and the tour operators' shepherding of tourists away from the Hennegans' shop and to the shops of the souvenir vendors*" (emphasis supplied) constitute the overt acts. Plaintiff in *Hennegan* had argued that the practice of the tour operators in steering tourists

to the souvenir shops which made illegal payments to the tour operators constituted a continuing violation of the antitrust laws. The souvenir shops continued to make payments to the tour operators and the tour operators continued to steer tourists to those shops, to the exclusion (and damage) of the plaintiffs in *Hennegan*. Hence the Ninth Circuit correctly held that each payment, *coupled with the steering of tourists away from plaintiffs' shop*, constituted overt acts within the meaning of the statute of limitations provisions of the relevant antitrust laws. In the case here, the purchase orders were awarded in 1989 and 1990, Petitioner lost the work at that time, and the damage was complete at that time. The fact that sharing of commissions arising from the 1989 and 1990 purchase orders occurred thereafter does not restart the limitations clock. There is no allegation in this case that Daikyo-Decoma could move the "transfer work" or the "1992 model year work" from time to time from manufacturer to manufacturer. The decision regarding the work, and the damage (if any) to Petitioner, was complete no later than 1990.

Hennegan, supra, is cited in *Columbia Steel Casting Co., Inc. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1996) cited by Petitioner. The Ninth Circuit in *Columbia* discusses *Hennegan* and states that *Hennegan* involved a situation where the "limitations period restarted each time tour guides sheparded tourists away from plaintiff's souvenir shop in furtherance of antitrust conspiracy [sic] between tour operators and other vendors" (*Columbia, supra* at 1445). Thus the required overt acts to restart the limitations period were again characterized by the Ninth Circuit as the steering of tourists away from plaintiffs'

shop. The payments themselves, as erroneously characterized by Petitioner in its brief, do not constitute sufficient overt acts to restart the statute of limitations.

A review of the facts in *Columbia, supra,* establish that the court there was faced with a similar situation. In this Sherman Act case, Portland General Electric Co. wrote a letter refusing to "wheel power" for Pacific Power & Light Co. in a situation involving the providing of electric service to Columbia. The refusal of Pacific to "wheel power" was alleged to be a violation of the Sherman Act. Additional alleged violations had occurred more than four years prior to the commencement of suit, and the issue facing the Ninth Circuit was whether the 1990 refusal of Portland, referenced above, was an overt act sufficient to extend the statute of limitations. The Ninth Circuit held that it was. This is much different from what Petitioner would have this court hold, namely that the mere payment of money in furtherance of the earlier overt act of issuing purchase orders to Respondent Pine River instead of Petitioner extends the statute of limitations.

The holding of the District Court and the Court of Appeals in this case is directly in accord with key authority on this issue, and in particular *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) and *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462 (6th Cir. 1996). As stated in *Zenith, supra* at 339:

> Thus if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, the cause of action immediately accrues to him to recover all damages incurred by that date and

> all provable damages that will flow in the future from the acts of the conspirators on that date.

Here the overt act involved was the issuance of the purchase orders in 1989 and 1990. At that time Grand Rapids Plastics was damaged, as it failed to receive the necessary and prerequisite orders for the "transfer work" and the "1992 model year work." The fact that the specific automotive parts were to be manufactured and shipped over time upon the issuance of periodic "releases" does not change the situation. Daikyo-Decoma could only issue the releases to Pine River pursuant to the 1989 and 1990 purchase orders. The *fact* of damage to Petitioner was complete in 1990. The calculation of the *amount* of damage would extend beyond 1990, but such does not restart the limitation period. Courts are faced each day with numerous situations involving projection and calculation of future damages. The number of automobiles to be produced in the future, and therefore the number of parts to be sold by automobile suppliers to the OEM manufacturers is one of the easiest calculations to be made. Each day the media contains projections as to such matters. Future damages in this instance are not speculative. Here the fact of damage was established, the amount of damage to the date of trial is certain, and only the amount of damage beyond trial need be projected. Suit should have been brought prior to four years following the issuance of the 1990 purchase order. Suit was not so brought, and hence the decisions of the lower courts in this case are correct and should stand.

DXS, supra, holds the same. In *DXS,* defendant announced a policy of refusing to deal with vendors other than authorized sales representatives. However,

defendant did not follow up on the policy, but delayed for some time before communicating with certain hospitals and advising them that the policy would be enforced. The subsequent statements to the hospitals, announcing that the policy would thereafter be enforced, were considered by the Sixth Circuit to be new and independent acts which restarted the statute of limitations. In the case at bar, the purchase orders were issued in 1989 and 1990. Daikyo-Decoma's decisions as to their supplier were final as of that time. There was not a hiatus between the announced intent to issue the purchase orders, and the actual issuance of the purchase orders, which would make the case analogous to *DXS, supra*.

Other cases cited by Petitioner are similar and support the well-reasoned opinions below. Petitioner cites *Twin City Sportservice, Inc. v. Charles O. Finley Company, Inc.*, 512 F.2d 1264 (9th Cir. 1975). *Twin City* is a Sherman Act case involving allegations of actual monopolization. The conduct involved was a long-term concession contract at a sports arena, and defendant urged that the suit should be dismissed inasmuch as the statute of limitations had expired, arguing that the limitation period began on the date that the contract was last extended, which date was more than four years prior to the institution of suit. Inasmuch as monopolization was alleged, the Ninth Circuit held, citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that the case dealt with "conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm." (*Twin City, supra* at 1270). *Twin City* continued to allegedly monopolize the concession activity at the sports arena every time there was an event. In the

case at bar there are only two acts which are alleged to be violative of the Robinson-Patman Act, and those are the issuance of purchase orders in 1989 and 1990 which awarded certain automotive contracts to Respondent Pine River, rather than to Petitioner. The damage occurred at that point in time, even though the sharing of commissions extended into the future. Contrary to the facts in *Twin City, supra,* and *Hanover Shoe, supra,* the situation here is a single act occurring at a specific point in time. Consequently *Twin City, supra,* can be easily distinguished and actually supports the proposition urged by Respondent in this case.

Petitioner further cites *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975). In *Poster Exchange,* the court was faced with a continuing refusal to deal, a Sherman Act violation. Defendant refused to supply plaintiff with certain accessory materials relating to the motion picture distribution industry. The refusal to deal was ongoing and continued well beyond the initial failure to provide the involved accessories. Citing *Hanover Shoe, supra,* the Fifth Circuit distinguished between a solitary act in violation of the antitrust laws, and a continuing conspiracy whereby the offending party continues, on day-to-day basis, to take action (in that case a refusal to deal) which causes ongoing damage to the complainant. In the case at bar, not only was Petitioner awarded purchase orders from Daikyo-Decoma for automotive parts since the earlier criticized purchase orders of 1989 and 1990 but Petitioner has failed to connect later purchase orders issued to Respondent Pine River with any illegal act in violation of the antitrust laws. A continuing violation is not involved here, nor any

Sherman Act monopolization allegation. Try as it will, Petitioner cannot tie in any way the issuance of the 1989 and 1990 purchase orders, accompanied by the sharing of commissions, to the issuance of purchase orders for the 1994 and 1998 model year work, which were not accompanied by any commission sharing whatsoever and which occurred during the same time period as the issuance of other purchase orders by Daikyo-Decoma to Petitioner. Again the situation in the case at bar is far different from the situation presented to this court in *Hanover Shoe, supra,* which involved a continuing practice of refusing to sell shoe manufacturing machinery to the plaintiff on a continuing basis over a number of years. None of the other cases cited by Petitioner in its brief supports the proposition that new and independent overt acts occurred after 1990 which would restart the statute of limitations.

The only argument raised by Petitioner that new and independent overt acts occurred since the issuance of the 1989 and 1990 purchase orders is the argument that in some unspecified way the payments by Chapman to Lakian arising out of the earlier purchase orders influenced Daikyo-Decoma to award purchase orders to Pine River in connection with the "1994 model year work" and the "1998 model year work." Both of these later purchase orders were issued within four years prior to the commencement of suit. In the same time period that it issued these later purchase orders, Daikyo-Decoma also issued purchase orders for certain work to Petitioner, Grand Rapids Plastics. Petitioner fails to set forth any link between the payments from Chapman to Lakian and the award of the 1994 and 1998 work. Certain facts are,

however, quite clear. Lakian ceased employment with Daikyo-Decoma in 1990, and after that date there is no evidence that he had any ability to influence the decisions of Daikyo-Decoma in connection with the issuance of purchase orders. In fact, there is no direct evidence of any link between the payments from Chapman to Lakian resulting from the earlier purchase orders, and the issuance of the later purchase orders. No authority has been cited by Petitioner which comes close to permitting the trial court to engage in the type of speculation urged here.

The Sixth Circuit correctly analyzed Petitioner's claim when it stated: "Grand Rapids does not allege that Chapman and Lakian entered any agreement regarding the 1994 work or the 1998 work" *Grand Rapids Plastics, Inc. v. Lakian, et al.*, 188 F.3d 401, 406 (6th Cir. 1999). Consequently the illegal act, if it occurred, occurred in connection with the award of the 1989 and 1990 purchase orders. The Sixth Circuit in effect adopted the following reasoning of the district judge: "However there is no evidence from which a reasonable juror could find that Grand Rapids' failure to obtain the 1994 or 1998 work was due to an antitrust violation" (District Court Opinion; Petitioner's Appendix at 37-38). The District Court further states that: "First, it is not alleged, nor is any evidence presented, that Lakian received or was scheduled to receive any monies from Chapman, through Pine River, involving the award of 1994 and 1998 model year work; work which the Plaintiff bid on but was not awarded." (District Court Opinion; Petitioner's Appendix at 38). This is not a situation of a continuing violation or continuing refusal to deal, as in most authority cited by

Petitioner. The injury, if it occurred at all, occurred in 1989 and 1990. Both the District Court and the Court of Appeals properly found in favor of Respondents and their conclusion should not be reversed.

CONCLUSION

For the above reasons, Respondent Pine River Plastics, Inc. requests that this petition be either dismissed or denied, for the reason that the four year statute of limitations has expired, and that no independent overt acts have occurred within the limitation period to permit Petitioner's claim to succeed under applicable law.

Respectfully submitted,

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